

## **BEFORE THE IOWA CIVIL RIGHTS COMMISSION**

**JAMES FRANKLIN, Complainant,**

**VS.**

**J & J MOTORS, Respondent.**

**CP# 18-82-9449**

### **DECISION ON REMAND**

On February 29, 1988, this case was remanded to the Hearing Officer as the result of a Remand Order from the Iowa District Court for Henry County in their Cause #CL 1159-0387. Specifically, the remand is on the issue of jurisdiction under Iowa Code 601A. 15(12), which provides:

A claim under this chapter shall not be maintained unless a complaint is filed with the commission within 180 days after the alleged discriminatory or unfair practice occurred.

The original complaint was filed on December 23, 1982. The amendment filed on June 27, 1985, is not in issue since the charges based on alcoholism were dismissed. The Commission found that Franklin was laid off on December 31, 1981 (Finding of Fact #8). The filing of the complaint (12-23-82) was more than 180 days after the incident of layoff. In order for the Commission to have jurisdiction of this complaint, there would have to be a continuing violation or an incident occurring within the 180 days prior to December 23, 1982. If Franklin was terminated, as opposed to laid off, in December 1981, the complaint would have been untimely and the Commission would not have jurisdiction over the complaint. If, however, Franklin had been laid off in December 1981, the 180-day period would not have started to run until such time as Franklin became aware that he had actually been terminated with no intention to recall or laid off and not recalled because of his age on a date of hire falling within the 180-day period.

The following findings of fact go directly to that issue.

1. There was general agreement that in December 1981, the time Franklin left Respondent, the work had become slow. Transcript pages 24, 32, 38, 57, 60, 71, 81-82.
2. Franklin believed that he was laid off indefinitely because the work was slow. The fact that Pitsinger received a different impression of the conversation does not negate what Franklin believed. Transcript pages 24, 39, 57, 60, 61, 66, 67, 87, lines 10-11.
3. Franklin left his tool box at Respondent's place of business and returned there several times to ask about being recalled. Respondent admits the tool box was there almost a year. Transcript pages 26, 66-67, 87, lines 12-15, 103, lines 17-25, 104, line 1.

4. It wasn't until late in the fall (1982) that Franklin became aware that he would not be recalled. He became aware that Respondent was remodeling, was taking on another franchise and workers were being hired. One worker, a younger person, was hired in August 1982, which is within the 180 day time requirement. Transcript pages 28, 41-42, 28, 67, 87, lines 20-23

5. The term "laid off" was consistently used and accepted at the Hearing except for one instance when Respondent stated that Franklin was terminated. However, Respondent later admitted he didn't know which words he used when he talked with Franklin in December 1981. Transcript pages 66, 83-84, 85, 87, 103, lines 5-8, 105.

6. Any incident which occurred on or after June 27, 1982, would be within the 180 day period.

7. The complaint filed December 1982, when memories were fresh, alleged that Franklin was laid off for economic reasons and would be called back in June 1982. It was also alleged in the complaint that Franklin visited with Respondent from May through August 1982, inquiring about getting called back. Franklin was still inquiring about being called back in December of 1982, the month he filed the complaint. Four years later, at the public hearing, memories were fuzzy on dates but essentially the dates were the same as stated in the complaint.

## CONCLUSIONS OF LAW

I. It is concluded that Franklin was given to believe by Respondent that he was laid off in December 1981 because work had substantially slowed down and that when things picked up again he would be able to return to work. It is further concluded that Respondent selected Franklin for layoff because of his age and had no intention of recalling him. Respondent continued to put him off when he asked if things were getting better. At the same time Respondent retained the younger workers, while hiring other younger workers. Furthermore, it wasn't until sometime between August and December 1982, that Franklin found out about the hiring of Burnham, a younger person. Franklin then realized that he would not be recalled and felt he was being discriminated against. This occurred within ISO days prior to filing his complaint. It was stipulated that the allegation in the complaint referred to the employment decision of lay off and failure to recall occurring 12-31-81 and continuing. If an employer is guilty of a continuing violation, a challenge is timely even if the first discriminatory act against the complaining party took place before the 180 day period, if the violation continued in to that period. Roberts v. North American Rockwell Corp. 650 F.2d 823 (6th Cir. 1981), 26 EPD 231,885.

If Franklin had been clearly terminated on December 31, 1981, that date would be the date discrimination could have occurred and the complaint is required to be filed within 180 days of that act. But here by stipulation of the parties, consideration was also to be given to the failure to recall Franklin. The facts support the conclusion that Franklin expected to be recalled. Respondent didn't tell Franklin when he came back to check on the economic status of the business that he had been terminated and would not be recalled. They told him things were still bad. Then they hired someone who was younger than Franklin knowing Franklin wanted to return to work. The argument that this was a continuing violation squares with the allegations in the complaint. The alleged discriminatory acts that continued were stated in the complaint. The

allegation is not just that he was unfairly laid off, but that he was not recalled when there was an opening and a younger person hired. It is recognized that the statute of limitations, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending charges arising from employment decisions which are long past. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 463-464 (1975). However, in cases where there is an ongoing policy of discrimination, there is also an ongoing violation of the Civil Rights Act. Roberts v. North American Rockwell Co. 650 F.2d 823 (6th Cir. 1981) 26 EPD 131,885. When a continuing discriminatory employment practice is alleged, the complaint may be timely filed notwithstanding that the conduct alleged is comprised in part of acts outside the charge filing period. Patterson v. Am. Tobacco Co., 586 F.2d 300, 304 (4th Cir. 1978).

2. IT IS CONCLUDED that the complaint was timely filed and the Iowa Civil Rights Commission has jurisdiction of this case.

Signed this 5th day of August 1988.

IONE G. SHADDUCK

Administrative Law Judge,

copy to: Teresa Baustian, AAG, ICRC

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